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(b) The acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities registered under section 12 of the Act.

NOTE: The exercise or sale of a pro rata right shall be reported pursuant to § 240.16a-4 and the exercise shall be eligible for exemption from section 16(b) of the Act pursuant to § 240.16b-6(b).

[56 FR 7265, Feb. 21, 1991, as amended at 61 FR 30393, June 14, 1996]

§ 240.16a-10 Exemptions under section 16(a).

Except as provided in § 240.16a-6, any transaction exempted from the requirements of section 16(a) of the Act, insofar as it is otherwise subject to the provisions of section 16(b), shall be likewise exempt from section 16(b) of the Act.

§ 240.16a-11 Dividend or interest reinvestment plans.

Any acquisition of securities resulting from the reinvestment of dividends or interest on securities of the same issuer shall be exempt from section 16 of the Act if the acquisition is made pursuant to a plan providing for the regular reinvestment of dividends or interest and the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer, and operates on substantially the same terms for all plan participants.

[61 FR 30393, June 14, 1996]

§ 240.16a-12 Domestic relations orders.

The acquisition or disposition of equity securities pursuant to a domestic relations order, as defined in the Internal Revenue Code or Title I of the Employee Retirement Income Security Act, or the rules thereunder, shall be exempt from section 16 of the Act.

[61 FR 30393, June 14, 1996]

§ 240.16a-13 Change in form of beneficial ownership.

A transaction, other than the exercise or conversion of a derivative security or deposit into or withdrawal from a voting trust, that effects only a change in the form of beneficial ownership without changing a person's pecu-

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niary interest in the subject equity securities shall be exempt from section 16 of the Act.

[61 FR 30393, June 14, 1996]

EXEMPTION OF CERTAIN TRANSACTIONS FROM SECTION 16(B)

SOURCE: Sections 240.16b-1 through 240.16b-8 appear at 56 FR 7270, Feb. 21, 1991, unless otherwise noted.

§ 240.16b-1 Transactions approved by a regulatory authority.

(a) Any purchase and sale, or sale and purchase, of a security shall be exempt from section 16(b) of the Act, if the transaction is effected by an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) and both the purchase and sale of such security have been exempted from the provisions of section 17(a) (15 U.S.C. 80a-17(a)) of the Investment Company Act of 1940, by rule or order of the Commission.

(b) Any purchase and sale, or sale and purchase, of a security shall be exempt from the provisions of section 16(b) of the Act if:

(1) The person effecting the transaction is either a holding company registered under the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.) or a subsidiary thereof; and

(2) Both the purchase and the sale of the security have been approved or permitted by the Commission pursuant to the applicable provisions of that Act and the rules and regulations thereunder.

[56 FR 7270, Feb. 21, 1991, as amended at 61 FR 30404, June 14, 1996]

§ 240.16b-2 [Reserved]

§ 240.16b-3 Transactions between an issuer and its officers or directors.

(a) *General.* A transaction between the issuer (including an employee benefit plan sponsored by the issuer) and an officer or director of the issuer that involves issuer equity securities shall be exempt from section 16(b) of the Act if the transaction satisfies the applicable conditions set forth in this section.

(b) *Definitions*—(1) A *Discretionary Transaction* shall mean a transaction

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pursuant to an employee benefit plan that:

(i) Is at the volition of a plan participant;

(ii) Is not made in connection with the participant's death, disability, retirement or termination of employment;

(iii) Is not required to be made available to a plan participant pursuant to a provision of the Internal Revenue Code; and

(iv) Results in either an intra-plan transfer involving an issuer equity securities fund, or a cash distribution funded by a volitional disposition of an issuer equity security.

(2) An *Excess Benefit Plan* shall mean an employee benefit plan that is operated in conjunction with a Qualified Plan, and provides only the benefits or contributions that would be provided under a Qualified Plan but for any benefit or contribution limitations set forth in the Internal Revenue Code of 1986, or any successor provisions thereof.

(3)(i) A *Non-Employee Director* shall mean a director who:

(A) Is not currently an officer (as defined in § 240.16a-1(f)) of the issuer or a parent or subsidiary of the issuer, or otherwise currently employed by the issuer or a parent or subsidiary of the issuer;

(B) Does not receive compensation, either directly or indirectly, from the issuer or a parent or subsidiary of the issuer, for services rendered as a consultant or in any capacity other than as a director, except for an amount that does not exceed the dollar amount for which disclosure would be required pursuant to § 229.404(a) of this chapter; and

(C) Does not possess an interest in any other transaction for which disclosure would be required pursuant to § 229.404(a) of this chapter.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, a *Non-Employee Director* of a closed-end investment company shall mean a director who is not an "interested person" of the issuer, as that term is defined in Section 2(a)(19) of the Investment Company Act of 1940.

(4) A *Qualified Plan* shall mean an employee benefit plan that satisfies

the coverage and participation requirements of sections 410 and 401(a)(26) of the Internal Revenue Code of 1986, or any successor provisions thereof.

(5) A *Stock Purchase Plan* shall mean an employee benefit plan that satisfies the coverage and participation requirements of sections 423(b)(3) and 423(b)(5), or section 410, of the Internal Revenue Code of 1986, or any successor provisions thereof.

(c) *Tax-conditioned plans.* Any transaction (other than a Discretionary Transaction) pursuant to a Qualified Plan, an Excess Benefit Plan, or a Stock Purchase Plan shall be exempt without condition.

(d) *Acquisitions from the issuer.* Any transaction, other than a Discretionary Transaction, involving an acquisition from the issuer (including without limitation a grant or award), whether or not intended for a compensatory or other particular purpose, shall be exempt if:

(1) The transaction is approved by the board of directors of the issuer, or a committee of the board of directors that is composed solely of two or more Non-Employee Directors;

(2) The transaction is approved or ratified, in compliance with section 14 of the Act, by either: the affirmative votes of the holders of a majority of the securities of the issuer present, or represented, and entitled to vote at a meeting duly held in accordance with the applicable laws of the state or other jurisdiction in which the issuer is incorporated; or the written consent of the holders of a majority of the securities of the issuer entitled to vote; *provided that* such ratification occurs no later than the date of the next annual meeting of shareholders; or

(3) The issuer equity securities so acquired are held by the officer or director for a period of six months following the date of such acquisition, *provided that* this condition shall be satisfied with respect to a derivative security if at least six months elapse from the date of acquisition of the derivative security to the date of disposition of the derivative security (other than upon exercise or conversion) or its underlying equity security.

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(e) *Dispositions to the issuer.* Any transaction, other than a Discretionary Transaction, involving the disposition to the issuer of issuer equity securities, whether or not intended for a compensatory or other particular purpose, shall be exempt, provided that the terms of such disposition are approved in advance in the manner prescribed by either paragraph (d)(1) or paragraph (d)(2) of this section.

(f) *Discretionary Transactions.* A Discretionary Transaction shall be exempt only if effected pursuant to an election made at least six months following the date of the most recent election, with respect to any plan of the issuer, that effected a Discretionary Transaction that was:

(1) An acquisition, if the transaction to be exempted would be a disposition; or

(2) A disposition, if the transaction to be exempted would be an acquisition.

NOTES TO § 240.16b-3

NOTE (1): The exercise or conversion of a derivative security that does not satisfy the conditions of this section is eligible for exemption from section 16(b) of the Act to the extent that the conditions of § 240.16b-6(b) are satisfied.

NOTE (2): Section 16(a) reporting requirements applicable to transactions exempt pursuant to this section are set forth in § 240.16a-3(f) and (g) and § 240.16a-4.

NOTE (3): The approval conditions of paragraphs (d)(1), (d)(2) and (e) of this section require the approval of each specific transaction, and are not satisfied by approval of a plan in its entirety except for the approval of a plan pursuant to which the terms and conditions of each transaction are fixed in advance, such as a formula plan. Where the terms of a subsequent transaction (such as the exercise price of an option, or the provision of an exercise or tax withholding right) are provided for in a transaction as initially approved pursuant to paragraphs (d)(1), (d)(2) or (e), such subsequent transaction shall not require further specific approval.

NOTE (4): For purposes of determining a director's status under those portions of paragraph (b)(3)(i) that reference § 229.404(a) of this chapter, an issuer may rely on the disclosure provided under § 229.404(a) of this chapter for the issuer's most recent fiscal year contained in the most recent filing in which disclosure required under § 229.404(a) is presented. Where a transaction disclosed in that filing was terminated before the director's proposed service as a Non-Employee Di-

rector, that transaction will not bar such service. The issuer must believe in good faith that any current or contemplated transaction in which the director participates will not be required to be disclosed under § 229.404(a) of this chapter, based on information readily available to the issuer and the director at the time such director proposes to act as a Non-Employee Director. At such time as the issuer believes in good faith, based on readily available information, that a current or contemplated transaction with a director will be required to be disclosed under § 229.404(a) in a future filing, the director no longer is eligible to serve as a Non-Employee Director; *provided, however*, that this determination does not result in retroactive loss of a Rule 16b-3 exemption for a transaction previously approved by the director while serving as a Non-Employee Director consistent with this note. In making the determinations specified in this Note, the issuer may rely on information it obtains from the director, for example, pursuant to a response to an inquiry.

[61 FR 30393, June 14, 1996, as amended at 70 FR 46089, Aug. 9, 2005; 71 FR 53263, Sept. 8, 2006]

§ 240.16b-4 [Reserved]

§ 240.16b-5 Bona fide gifts and inheritance.

Both the acquisition and the disposition of equity securities shall be exempt from the operation of section 16(b) of the Act if they are: (a) Bona fide gifts; or (b) transfers of securities by will or the laws of descent and distribution.

§ 240.16b-6 Derivative securities.

(a) The establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) of the Act, and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act: *Provided, however*, That if the increase or decrease occurs as a result of the fixing of the exercise price of a right initially issued without a fixed price, where the date the price is fixed is not known in advance and is outside the control of the recipient, the increase or decrease shall be exempt